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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

70-823

No. ... ~~1286~~

CENTRAL HARDWARE COMPANY,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent,

and

RETAIL CLERKS UNION, LOCAL 725, RETAIL CLERKS INTERNATIONAL ASSOCIATION, AFL-CIO,
Intervenor.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals
for the Eighth Circuit

RONALD L. AYLWARD
KEITH E. MATTERN
1509 Washington Avenue
St. Louis, Missouri 63166
Counsel for Petitioner

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PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit

The Petitioner, Central Hardware Company (hereafter "Central"), respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in this case on March 24, 1971. A timely petition for rehearing, en banc, was denied by an equally divided Court on April 26, 1971.

OPINIONS BELOW

The divided opinion of the Court of Appeals, as yet unreported, appears at Appendix A, infra, pp. A1-A17. The Decision and Order of the National Labor Relations

Board (hereafter "the Board") are reported at 181 N.L.R.B. No. 74, and appear at Appendix B, infra, pp. A. 18-A. 24.

JURISDICTION

The judgment of the Court of Appeals was entered on March 24, 1971, rehearing denied on April 26, 1971. This Petition for certiorari was filed within 90 days of the latter date. This Court's jurisdiction is invoked under 28 U.S.C., § 1254 (1).

QUESTIONS PRESENTED

1. Whether, and to what extent the Supreme Court's decision in *Food Employees Union Local 590 v. Logan Valley Plaza*, 391 U.S. 308 (1968) abrogates this Court's rule in *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956) in the instance where union organizers come onto the parking lot of a single free-standing retail store for the sole purpose of conducting an organizational campaign, notwithstanding that (1) there are effective alternate means available to present the union's organising message to the employees, (2) the union organizer's conduct while on the parking lot was abusive, coercive and objected to by many employees, and (3) the parking lot is owned and maintained solely by the owner and closely regulated so as to insure use solely by its customers and employees.

2. Whether the Court of Appeals for the Eighth Circuit erred in applying this Court's rule in *Logan Valley* rather than this Court's rule in *Babcock & Wilcox* in declaring petitioner's action of barring non-employee union organizers from soliciting petitioner's employees on its parking lot, violative of Section 8(a)(1) of the National Labor Relations Act, as amended, 29 U.S.C., Sec. 158.

3. May the owner of a free-standing store with its own adjacent parking lot be compelled to allow non-employee union organizers' unrestricted access to said parking lot

to present an organizational message to the owner's employees notwithstanding that (1) there are effective alternative means available to present the union's organizing message to the employees, (2) the union organizers' conduct while on the parking lot was abusive, coercive and objected to by many employees, and (3) the parking lot is owned and maintained solely by the owner and closely regulated so as to insure use solely by its customers and employees.

CONSTITUTION AND STATUTORY PROVISIONS INVOLVED

This case involves Sec. 7 and 8 of the National Labor Relations Act, as amended, 61 Stat. 136, 73 Stat. 519, 29 U.S.C., Sec. 151 et seq. (hereafter "the Act"); the First and Fifth Amendments to the United States Constitution. These are reprinted in the pertinent parts in Appendix C, Infra, pp. A. 25.

STATEMENT OF THE CASE

1. Proceedings Before the National Labor Relations Board.

The Board found Central had violated Sec. 8(a)(1) and (3) of the Act as a result of its actions during an organizational campaign by non-employee representatives of the Retail Clerks Union, Local 725 (hereafter "the Union") at Central's two stores in the Indianapolis, Indiana, area in 1968.

At the end of 1968, Central operated ten retail hardware stores, two of which were in Indianapolis and eight of which were in the St. Louis, Missouri, area.

In early 1968, after some market research, Central decided to move into the Indianapolis market, with one store

s the West side of that city and another on the East side. he criteria for the store locations were that the buildings e of the 70,000 square foot variety with adequate cus- mer parking facilities and, additionally, be free-standing ites that do not depend on traffic attracted by any other establishment.

Each Indianapolis store has a parking lot adjacent to e building and the use of this lot is limited to Central's ental customers and its employees. Each lot can be en- ed from at least two streets at distinct entry points. The res and lots are leased by Central from an individual o does not own or lease any other lots or stores in the a to others. The lots are maintained by Central solely r its customers and employees. Central repairs, insures d maintains its own lots exclusively. There are no ysical attributes of Central's premises and the stores on the road which would evidence a shopping center. ere are some other business establishments in the area Central's stores, but all of them are small, on different rcels of land owned by others, and have their own park- g lots which handle their own store's customers.

Central's two Indianapolis stores opened for business on ne 5, 1968, although Central took physical possession of e buildings on April 15, 1968. Approximately 250 to 0 employees were initially hired from the Indianapolis a. The majority of these employees live within five es of the store where they work and 75% live within miles.

The Board found the Union began an organizational ve a week or so before the stores opened, but the record es that Central hired Edward Stahl, Jr., in April, 1968, an employee, not knowing that Stahl was an undercover nt for the Union and was paid to work full time for the on in organizing Central's Indianapolis stores. Stahl ived full time salary both from the Union and Central

and utilized his position to talk to the employees and solicit them to join the Union. He was instrumental in supplying a list of the employees, 80% complete, to the Union organizers.

The organizational campaign took place primarily on Central's parking lots with some 9 or 10 Union organizers conducting a blitz-type campaign to get signed authorization cards to establish the Union as the bargaining agent for the employees of both stores.

After the campaign began, many employees approached Central's management protesting the union organizational activity on the parking lots, complaining that they were detained in leaving the lot and were threatened. Some of the employees even threatened to quit Central's employ unless this type of organizing activity ceased. Management requested that the complaints be put in written form. Many employees wrote letters and 97 out of 125 employees at the East store directed a written complaint to an executive official of Central headquartered in St. Louis. The signed complaint stated that the undersigned employees did not want to be harassed any more by the Union and they did not wish to join this Union.

Central's president accepted the complaint and instructed the Indianapolis management to keep all harassing union organizers out of the stores and off the parking lots. At the same time, Central instituted a charge of unfair labor practices against the Union, based on the letters and other complaints.

Although the Board refused to act on Central's charge against the Union, it did issue a Complaint against Central based on numerous charges the Union had filed with the Board. A hearing on the Complaint was concluded on February 6, 1969. On the principal issue before this Court, the Board found that in light of the quasi-public nature

of Central's parking lots, Central had violated Sec. 8(a) (1) and (3) of the Act by its unlawful rule barring non-employee union organizers from the parking lots.

2. The Decision of the Court of Appeals.

The Court, in a divided decision, has upheld the Board's finding that Central violated Sections 8(a)(1) and (3) of the Act by denying union organizers access to its parking lots. The Court found that, under the mandate of *Logan Valley*, Central's parking lots have attained a "quasi-public status" and its non-employee no-solicitation rule was, therefore, overly broad. The majority of the Court held that the United States Supreme Court's decision in *Babcock & Wilcox* was no longer applicable to this situation because of the United States Supreme Court's decision in *Logan Valley*. Judge Gibson's dissent, however, would hold that *Babcock* was still the law in the instant situation and was not modified or overruled by the Supreme Court's decision in *Logan Valley*. He points out that the majority decision failed to distinguish between the peaceful picketing, protected as a First Amendment right in the *Logan Valley* decision, and the Union's solicitation message, the protection of which is limited to the statutory rights of union organizers to communicate with employees. Therefore, denying the applicability of *Logan Valley*, Judge Gibson would have found Central's non-employee no-solicitation rule valid under the rule enunciated in *Babcock*.

REASONS FOR GRANTING THE WRIT

This case squarely faces the issue as to whether this Court's decision in *Logan Valley* has abrogated the clear rule of *Babcock & Wilcox* as that rule pertains to a union organizer's entry onto the private parking lot of a single free-standing store for the purpose of conducting a union organizational campaign while, at the same time, ignoring

alternate equally effective methods of communicating with the employees. If, as Central contends, *Babcock & Wilcox* and *Logan Valley* represent totally different rules of law in totally different contexts, then the Eighth Circuit has erred in applying the *Logan Valley* rule to the instant case. If the decision below is allowed to stand, it will have created a conflict between *Babcock* and *Logan Valley* which heretofore has not existed.

This Court in its *Babcock* decision, facing the same issue as to the rights of non-employee union organizers to come upon an employer's property to solicit membership of its employees into a union, established what has been considered the law up until this time. This Court granted certiorari in the *Babcock* case because of conflicting decisions in the courts below. The Tenth Circuit Court of Appeals had held that a non-employee could come onto company property only if there was a showing that the employees involved were so otherwise inaccessible to the union organizers as to be a handicap to the employees' guaranteed right of self-organization. (NLRB v. Seamprufe, Inc., 222 F.2d 858, 10th Cir. 1960.) At approximately the same time, the Sixth Circuit Court of Appeals held to the contrary that the barring of union organizers from an employer's property was an "unreasonable impediment of the freedom of communication essential to the exercise of its employees' rights to self-organization" (NLRB v. Ranco, Inc., 222 F.2d 543, 6th Cir. 1960).

In resolving the aforesaid lower courts' conflicting decisions, this Court held that the National Labor Relations Act did not authorize a servitude on an employer's property where no employee was involved. It held that the employer's Fifth Amendment right to freely enjoy his property must be balanced against the employee's statutory rights under the Act to learn of the rights of self-

organization. In considering the adjustment of conflicting rights, the Court stated the following guiding principle:

> "Organization rights are granted to workers by the same authority, the National Government, that preserves property rights. Accommodation between the two must be obtained with as little destruction of one as is consistent with the maintenance of the other. The employer may not affirmatively interfere with organization; the union may not always insist that the employer aid organization." 351 U.S. at 112.

Under *Babcock*, an employer was permitted to deny access to its property by non-employee union organizers, ". . . if reasonable efforts by the union through other available channels of communication will enable it to reach the employees with its message and if the employer's notice or order does not discriminate against the union by allowing other distribution" (*Babcock* at 112). This is exactly the circumstance in the case at issue. Central has maintained that there were other reasonable means of communication available and has proven that it has always denied access to its parking lots to anyone other than its customers and employees. The court below, by innuendo, indicated that the Union had ample alternate means of communication rather than the use of the parking lots. Judge Gibson's dissent specifically found that the alternate means of communication were available.

This would have ended the instant case in Central's favor had the Eighth Circuit Court of Appeals not considered this Court's *Logan Valley* decision as requiring it to decide otherwise. The exact words of the Eighth Circuit Court are significant: ". . . under the mandate of *Logan Valley Plaza* . . ." (App. p. 11) (emphasis supplied).

Although the *Logan Valley* decision neither mentioned nor alluded to the prior *Babcock* case, the Eighth Circuit

Court of Appeals has now held, in effect, that *Babcock* has been modified and/or abrogated by the *Logan Valley* decision to the extent that union organizers now have free access to any company premises that are "quasi-public" in character without having to first satisfy the availability rule of *Babcock*. Indeed, the decision below holds that since *Logan Valley* the *Babcock* precedent can be invoked only in those cases where the use of the company property involved closely resembles Babcock & Wilcox's use of its factory parking lot. The Eighth Circuit held that "The essential distinction between *Babcock & Wilcox* and *Logan Valley Plaza* rests upon a determination of the use of the properties in question" (App. p. A-11). It is Central's contention that the aforesaid distinction made by the Eighth Circuit is an incorrect application of this Court's *Logan Valley* decision.

It is true that both *Logan Valley* and *Babcock* pertain to the same basic issue of balancing the protection of property rights from trespass against the rights of a non-employee union organizer to communicate a message. There is one major difference, however, in these two cases. In *Logan Valley*, the message to be communicated was directed to the public at large and, of necessity, was required to be communicated on Logan Valley Plaza since this was the only place where patrons of Weis Market could be found. It is important to note also that the *Logan Valley* decision was tried on Constitutional issues involving rights of free speech under the First Amendment.

The *Logan Valley* decision relied heavily on *Marsh v. Alabama*, 326 U.S. 105 (1946), a case involving a Jehovah's Witness seeking to distribute leaflets to the general public on the streets of Chickasaw, Alabama. To rely on *Marsh* in *Logan Valley* was natural, since both cases involved persons seeking to communicate with the general public in places generally open to the public at large with-

out limitation, and both cases were decided on the basis of the First Amendment.

However, *Logan Valley* neither mentioned nor alluded to *Babcock & Wilcox* (earlier decided) nor, in turn, did *Babcock & Wilcox* mention nor allude to *Marsh* (much earlier decided) although all three cases deal with the same basic issue, trespass on private property for the purposes of communicating a message. This is not surprising, since each line of cases (*Logan Valley* and *Marsh* on the one hand and *Babcock & Wilcox* on the other hand) deals with a separate and distinct aspect of the basic method of communication with an accompanying separate and distinct rule of law. As Judge Gibson points out in his dissent in the case below, "This is a critical distinction which the majority fails to discuss."

In the instant case, Central's employees were known to the union, were readily identifiable and were available to the union organizers at locations away from Central's parking lots. This was exactly the situation in *Babcock* where this Court was able to balance the employees' Sec. 7 rights against the employer's Fifth Amendment right without any need to even consider the First Amendment.

Likewise, Mr. Justice Black pointed out in his *Logan Valley* dissent, the majority opinion did not reach any issue under the Act (391 U.S. 329). Mr. Justice White in his dissent even went further in pointing out that Congress did not think it necessary to permit picketing on private property, either to further the national labor policy under the commerce clause or to implement and enforce the First Amendment (391 U.S. 340). *A fortiori*, in the instant case where the issues have been submitted both to the Board and the Courts, not on First Amendment rights but on statutory rights, Congress and this Court have heretofore prescribed the conditions upon which Central's property rights must yield to non-em-

ployee union organizers and these conditions do not exist in the instant case.

By holding that *Logan Valley* is the precedent for its opinion, the majority decision below equates NLRB Sec. 7 union solicitation to First Amendment picketing, an equation that, heretofore, has not been made, and has created a conflict which has heretofore not existed and which was not intended by either the *Logan Valley* or *Babcock & Wilcox* decisions.

Of equal reason for this Court to review the decision below is that the concept of a quasi-public nature of the streets of company towns (as in *Marsh*) and large shopping centers (as in *Logan Valley*) has now, by the decision below, been extended to a single free-standing retail store with an adjacent parking lot.

Contrary to the facts in *Marsh* or *Logan Valley*, Central owned, maintained and regulated its parking lots solely for the use of its invited customers and employees. No instance was shown where the parking lots were used for any purpose which would indicate that they were accessible to the public without limitation. To the contrary, Central presented substantial evidence that trespassers were uniformly barred from the parking lots.

The finding that Central's lots were similar to Logan Valley Plaza was not warranted by the evidence. Central's lots were solely for the benefit of Central's customers and employees. They were not public squares or streets and did not create a "cordon sanitaire." The fact that a few small stores were on adjacent property did not alter the character of the lots into that of a shopping center operation.

Of compounding importance is the particular manner in which the union organizers invaded Central's parking lots

and the manner in which it conducted its organizational drive. The Court below characterized it as a "a blitz-type campaign" (App. p. A-3) and found that an overwhelming majority of the employees at one of the stores had signed a complaint concerning these tactics. Surely, such conduct cannot be equated to either the peaceful picketing in *Logan Valley* or the passing out of leaflets in *Marsh*.

CONCLUSION

Central respectfully submits that if the decision below is allowed to stand both *Logan Valley* and *Babcock* will take on a new scope which was never intended by this Court in either of those closely drawn decisions.

The *Logan Valley* aspect of First Amendment free speech, peaceful picketing in the quasi-public open expanse of a large shopping center will have been extended to a blitz-type union organizational campaign conducted on a single retail store's parking lot.

In like manner, the *Babcock* necessity of striking a balance between the union organizer's Sec. 7 rights to communicate his message against the storeowner's Fifth Amendment right to peacefully enjoy his property will be obviated in any instance where the storeowner's use of his land does not closely resemble the use in *Babcock*.

It is worthy to note that if the decision below is allowed to stand, Central and any other retailer in a similar position is wholly without recourse to protect its employees against harassing or coercive tactics by union organizers on the parking lots since Central endeavored to do so at the very outset of this case by filing a complaint with the Board. Not only was this complaint denied, but the signed petition of the many employees subjected to the harassment, intimidation and coercion,

became the basis of the Board's findings against Central. At least as Central contends the law now stands, it was, and is, able to correct these abuses.

For the reasons stated herein, this Court is respectfully urged to grant this Petition for Writ of Certiorari.

Respectfully submitted

RONALD L. AYLWARD

KEITH E. MATTERN
1509 Washington Avenue
St. Louis, Missouri
Attorneys for Petitioner